STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ARMANI BURGETT, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

EDWARD BURGETT,

Respondent-Appellant.

UNPUBLISHED
March 11, 2008

No. 280642
Wayne Circuit Court
Family Division
LC No. 06-461610

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child, Armani Burgett, under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (h), and (k)(*iii*).[1] We conditionally affirm the trial court's order and remand the matter for the purpose of determining compliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, respondent argues that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree. To terminate a parent's parental rights to a child, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). If a statutory ground for termination is established, the trial court must terminate parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 354; 612 NW2d 407 (2000). The trial court's decision terminating parental rights is reviewed for clear error. MCR 3.977(J); *Trejo*, *supra* at 356-357; *Sours*, *supra* at 632-633.

[1] The parental rights of Armani's mother, were not terminated. Therefore, she is not a party to this appeal.

The evidence established that Armani suffered a broken leg and broken arm while in respondent's care. Respondent gave two different explanations for Armani's injuries that, according to expert testimony, were not consistent with the injuries. The record indicated that the child's mother had never harmed Armani, but respondent had an extensive history of physical abuse against Armani and his mother. While Armani's mother was pregnant, respondent pinned her down and sat on her abdomen after expressing that he did not want the child and would cause an abortion by punching her stomach. When Armani was only two weeks old, his mother saw respondent attempting to choke him. Respondent threatened to retaliate if the mother reported the incident to police. Respondent had also choked the mother before. The mother testified that on November 20, 2006, she was awakened by a snapping sound that came from the direction of respondent and Armani. The mother believed that she heard the sound of respondent breaking Armani's arm. Given Armani's young age and his inability to move independently, the type of fractures and their locations, respondent's explanations for the injury were not feasible. Given respondent's history of abuse and the details of the child's injury, clear and convincing evidence established the statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), and (k)(*iii*).

The court also did not err in terminating respondent's parental rights pursuant to MCL 712A.19b(3)(h). On August 16, 2004, respondent pleaded guilty to third-degree fleeing a police officer, MCL 257.602a(3)(a), for which he was sentenced to a minimum of one year and a maximum of five years in prison. Respondent admitted that his maximum discharge date was 2011. There was no evidence that respondent would be granted an early release. Under the circumstances, the timely establishment of a proper home for Armani is extremely unlikely. Even in the event of parole, respondent has many hurdles to overcome. He must find suitable housing and a legal source of income, while attending to the reporting obligations and enduring the mobility restrictions of parole. Respondent does not address his prospects for providing a normal home for Armani after his release from prison, nor does he provide evidence that he will be granted an early release. Therefore, given the uncertainty of respondent's release date, probation and parole restrictions, there was no reasonable expectation that he would be able to provide a normal home for Armani within two years of the termination hearing. MCL 712A.19b(3)(h).

Further, the evidence did not demonstrate that termination of respondent's parental rights was clearly not in the child's best interests. If a court finds that there are grounds for terminating parental rights, termination shall be ordered unless the court finds that termination of parental rights is clearly not in the child's best interests. MCL 712A.19b(5); *Trejo*, *supra* at 355-357. Respondent was a violent man. He choked and abused Armani and his mother and broke two of his infant son's bones. Clearly, it was not against Armani's best interests to terminate respondent's parental rights.

Finally, respondent contends that the trial court failed to properly address the issue of Armani's eligibility for membership in an Indian tribe. Under the ICWA, an Indian child's tribe is entitled to notice of termination of parental rights hearings where the court knows or has reason to know that an Indian child is involved. 25 USC 1912(a). An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an

Indian tribe." 25 USC 1903(4). "[T]he question whether a person is a member of a tribe is for the tribe itself to answer." *In re NEGP*, 245 Mich App 126, 133; 626 NW2d 921 (2001).

In this case, respondent indicated that he was of Cherokee descent at the preliminary hearing on November 22, 2006, and at the continued preliminary hearing on December 1, 2006. Petitioner acknowledged respondent's claim of Indian heritage and indicated that they had submitted appropriate documents to check into the matter. However, no discussion, correspondence or evidence about tribal association was presented or considered by the trial court. Petitioner concedes that it should have offered documentation regarding the question of Indian heritage during the permanent custody trial but failed to do so.

When a respondent's parental rights have been properly terminated under Michigan law, but the petitioner and the trial court failed to comply with the ICWA's notice provisions, reversal is not necessarily required. *In re IEM*, 233 Mich App 438, 450; 592 NW2d 751 (1999). Instead, the proper remedy is to "conditionally affirm the [trial] court's termination order, but remand so that the court and [petitioner] may provide proper notice to any interested tribe." *Id.* Accordingly, we remand the matter to determine whether proper notice was provided to interested Indian tribes pursuant to 25 USC 1912(a) and MCR 3.980 and, if so, whether any tribe sought to intervene. If the trial court concludes that the notice requirements of the ICWA were satisfied and yet no tribe was interested in intervening, the original termination order shall stand. If proper notice under the ICWA was not provided or if an Indian tribe is interested in intervening, the court shall conduct further proceedings consistent with the ICWA.

We conditionally affirm the trial court's order terminating respondent's parental rights but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher